



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

September 11, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ref: 8ENF-T

Mark Young
P.O. Box 3160
Montrose, CO 81402

Re: Findings of Violation and
Order for Compliance
Docket No. **CWA-08-2003-0091**

Dear Mr. Young:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that you are in violation of the Clean Water Act, as amended (CWA). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 CFR § 328.3.

Specifically, you have discharged dredged material into waters of the United States without authorization under the CWA. These discharges of pollutants into Cedar Creek and an unnamed tributary of Cedar Creek and its adjacent wetlands have occurred on your property at a site located in the southeast quarter of section 21, Township 49 North, Range 9 West, Montrose County, Colorado.

Enclosed is an EPA Region 8 administrative order which specifies the nature of the violations and describes actions necessary in order for you to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The order requires you to inform EPA in writing, within five days of receipt, of your intent to fully comply with the order.

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or



loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate your responsibility to comply with the Act or this order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are Sheldon Muller, Enforcement Attorney, at 303-312-6916 and Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Findings of Violation and Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk, w/enclosures
Brooks Carter, U.S. Army Corps of Engineers, w/enclosures
Ken Jacobson, U.S. Army Corps of Engineers, w/enclosures
Nicholas A. Mezei, U.S. Army Corps of Engineers, w/enclosures
Mark Pifher, Colorado Department of Public Health and Environment, w/enclosures

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	FINDINGS OF VIOLATION AND
)	ADMINISTRATIVE ORDER FOR
Mark Young)	COMPLIANCE
P.O. Box 3160)	
Montrose, CO 81402)	
)	
)	Docket No. CWA-08-2003-0091
)	
Respondent.)	
_____)	

I. STATUTORY AUTHORITY

This Findings of Violation and Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by section 309 of the Clean Water Act (“CWA”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

1. Respondent is an individual residing in Montrose, Colorado.
2. At all relevant times, Respondent owned, controlled, and/or operated property located along Cedar Creek, immediately upstream of its confluence with the Montrose Arroyo. The property is located within the southeast quarter of section 21, Township 49 North, Range 9

West, in Montrose County, Colorado. Prior to its damming by Respondent, an unnamed tributary flowed into Cedar Creek within the boundaries of Respondent's property. Wetlands are located adjacent to the unnamed tributary.

3. Cedar Creek is tributary to the Uncompahgre River, which is tributary to the Gunnison River, which is tributary to the Colorado River. The Colorado River is and was at all relevant times a navigable, interstate water.
4. On March 20, 2003, the U.S. Army Corps of Engineers ("Corps") conducted an inspection on Respondent's property. The Corps found, and EPA through the issuance of this Order finds, that Respondent discharged fill material and/or caused fill material to be discharged into approximately 300 linear feet of a meander of Cedar Creek, resulting in realignment of the creek. The Corps found, and EPA hereby finds, that Respondent discharged fill material and/or caused fill material to be discharged into the mouth of the unnamed tributary to Cedar Creek referenced in paragraph 2 of Section II of this Order to create a 200-foot dam across the tributary, resulting in the inundation of approximately one-half acre of wetlands. The Corps also found, and EPA hereby finds, that Respondent constructed a bridge and/or caused a bridge to be constructed across Cedar Creek where such bridge's abutments appear to have been constructed, at least in part, below the ordinary high water mark ("OHWM") of Cedar Creek. The OHWM defines the limits of the Corps' jurisdiction over non-tidal waters in the absence of adjacent wetlands. Most, if not all, of the work described above was performed in 2002.
5. The activities described in paragraph 4 of Section II of this Order resulted in the loss of 300 feet of meander length of Cedar Creek and adversely altered the hydraulic characteristics of the creek channel, causing higher flow velocity and compromising stream bank stability.

These effects increase the potential for greater erosion to the banks of Cedar Creek as it flows through Respondent's property and that of Respondent's neighbors.

6. The activities described in paragraph 4 of Section II of this Order were performed using common earthmoving vehicles and equipment, including a bulldozer, all of which were operated by Respondent or by somebody on behalf of Respondent.
7. Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).
8. The discharged fill material and bridge abutments referenced in paragraph 4 of Section II of this Order are and were at all relevant times "fill material" within the meaning of 33 CFR § 323.2(e) and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).
9. The vehicles and equipment described in paragraph 6 of Section II of this Order are and were at all relevant times each a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).
10. Cedar Creek and the unnamed tributary and its adjacent wetlands referenced in paragraphs 2 and 3 of Section II of this Order are and were at all relevant times "waters of the United States" within the meaning of 33 CFR § 328.3(a) and therefore "navigable waters" within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).
11. The placement of fill material and bridge abutments into Cedar Creek and into the unnamed tributary constitutes the "discharge of pollutants" within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).
12. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with

section 404 of the CWA, 33 U.S.C. § 1344.

13. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.
14. 33 CFR § 323.3(a) specifies that, unless exempted pursuant to 33 CFR § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.
15. Respondent is not and never has been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraph 4 of Section II of this Order.
16. Respondent's activities described in paragraph 4 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondent into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).
17. The removal of the fill material illegally discharged into waters of the United States at Respondent's property and restoration of the impacted waters, including Cedar Creek and the unnamed tributary and its adjacent wetlands, to a condition that closely approximates their condition and function prior to the discharge of the fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

18. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 17 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondent's unpermitted activities.
19. This Order was issued after consultation and coordination with the Corps' Sacramento District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of the EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondent shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.
2. Respondent shall remove all fill materials that were discharged as a result of the violations identified in this Order and restore Cedar Creek, the unnamed tributary and its adjacent wetlands, and any other impacted areas to their pre-impact conditions and grade, unless EPA

approves otherwise.

3. Within five (5) calendar days of receipt of this Order, Respondent shall inform EPA in writing of Respondent's intent to fully comply with the Order. EPA requests that Respondent meet with EPA within fourteen (14) calendar days of issuance of this Order if there are concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondent's responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondent by EPA.
4. All fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in stream and wetland restoration whose qualifications are acceptable to EPA. The consultant also shall directly supervise all work performed pursuant to the EPA-approved restoration plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
5. All fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream and wetland restoration whose qualifications are acceptable to EPA. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.
6. Within seven (7) calendar days of any disapproval by EPA of the qualifications of the consultant or equipment operator referenced in paragraphs 4 and 5 of Section III of this Order, Respondent shall submit the professional resume of a qualified individual who is acceptable to EPA.

7. Within forty-five (45) calendar days of receipt of this Order, Respondent shall submit to EPA for review and comment a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the channel fill from the Cedar Creek meander and restoring Cedar Creek to its pre-impact channel configuration and grade. The Restoration Plan shall also include plans for the removal of the fill associated with the dam and restoration of the mouth of the tributary, its adjacent wetlands, and any other impacted areas to pre-impact conditions. In addition, the Restoration Plan shall include a technical determination, with supporting documentation, of the location of the bridge abutments, referenced in paragraph 4 of Section II of this Order, in relation to the OHWM of Cedar Creek. If the determination is made that any portions of the bridge abutments are located below the OHWM, the Restoration Plan shall include an assessment of the actual and potential adverse impacts to Cedar Creek resulting from the location of the bridge abutments and a proposal for a remedy that will ensure the hydraulic stability of Cedar Creek including, if necessary, removal of the bridge and its abutments.
8. The Restoration Plan shall be prepared in accordance with “U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans,” attached hereto as Exhibit A. In addition, the Restoration Plan shall include:
 - a. A detailed work plan and schedule for all of the work to be accomplished by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) days after EPA approves the Restoration Plan; and
 - b. Detailed professional drawings of the restoration site, including plan and profile drawings

with control elevations for pre-impact conditions, current conditions, and proposed restoration conditions. Deviations between pre-impact conditions and proposed restoration conditions shall be itemized, and detailed technical justifications for such deviations shall be provided.

9. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondent shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.
10. Upon receiving EPA's written approval of the Restoration Plan, Respondent shall obtain all necessary permits to implement the EPA-approved plan and then commence restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondent shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.
11. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondent shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If required, Respondent shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 10 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
Colorado/Gunnison Basin Regulatory Office
402 Rood Avenue, Room 142
Grand Junction, CO 81501-2563
Telephone: 970-243-1199

12. Respondent shall submit three (3) copies of the Restoration Plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-T
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6359
Facsimile: 303-312-6409

A copy of the restoration plan, all notifications, and related correspondence shall also be provided to:

Sheldon H. Muller, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: 303-312-6916
Facsimile: 303-312-6953

13. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.
14. Respondent shall allow or use Respondent's best efforts to allow access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the Colorado Department of Public Health and Environment, and the Colorado Division of Wildlife, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:
- a. To inspect and monitor progress of the activities required by this Order;
 - b. To inspect and monitor compliance with this Order; and

- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

15. This Order shall be effective upon receipt by Respondent.
16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.
17. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondent of Respondent's obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondent to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondent to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 10th day of September, 2003.

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE
REGIONAL HEARING CLERK.**

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 16, 2003.